Issue: Compliance/Hearing Decision; Ruling Date: August 12, 2003; Ruling #2003-130; Agency: Department of Transportation; Outcome: hearing officer to issue modified decision for clarification.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2003-130
August 12, 2003

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 5750. The grievant claims that the hearing officer exceeded the scope of his authority and abused his discretion by (1) failing to adequately consider his medical condition in determining the appropriateness of the Group III Written Notice; (2) concluding that falling asleep at his job could endanger the lives of others; and (3) concluding that management was unaware of the grievant's medical condition at the time the discipline was issued. Additionally, the grievant maintains that he was unable to present evidence in support of the above claims because his medical condition prevented him from attending the hearing, and that had he been able to present such evidence, there would have been a different outcome.

FACTS

The grievant was employed with the Virginia Department of Transportation (VDOT or the agency) until he received a Group III Written Notice on April 9, 2003 for falling asleep on the job on February 26, 2003.[1] On April 16, 2003, the grievant initiated a grievance alleging that his sleeping resulted from a medical disability and had not affected his job performance or work record.

The hearing officer had scheduled a prehearing conference for June 11, 2003. On that day, the hearing officer attempted to contact the grievant via telephone, but received no answer. A message was left for the grievant to contact the hearing officer as soon as possible. On June 13, 2003, a letter confirming the hearing date for June 25, 2003 was mailed to both parties.

On June 18, 2003, an agency human resources officer informed the Division of Hearings that the grievant would be unavailable on June 25, 2003 because he would be in the hospital all week. The following day, the Division's administrative assistant contacted the

[1] The April 9 Group III Notice did not itself include termination. The grievant's termination was based upon the accumulation of the April 9 Group III Notice and an earlier active Group III Notice.

grievant. Once again, the grievant stated that he would be in the hospital all week and unable to attend the June 25, 2003 hearing. The grievant was told that he must speak with the hearing officer if he wanted a continuance and that he must notify the hearing officer in writing if he wished to withdraw. The grievant replied that he wished to speak with his lawyer first and would try to call the hearing officer the following day, June 20, 2003.

There was no call from the grievant on June 20, 2003. The hearing officer's administrative assistant informed the grievant via his answering machine that the hearing would proceed on June 25, 2003. On June 23, 2003, the Division of Hearings left another message for the grievant to inform him that the hearing would take place on June 25, 2003. The following day, the Division of Hearings received a message from the grievant inquiring as to why the hearing was proceeding when he had conveyed his unavailability on the scheduled day. Once again the hearing officer's administrative assistant contacted the grievant at home and told him that if he desired a continuance, he must speak with the hearing officer, who was currently not in the office but could be reached at his location. The grievant indicated that he would be available for the next hour. Within approximately fifteen minutes, the hearing officer attempted to contact the grievant at home twice and received no answer. The hearing officer left the grievant a message to contact him as soon as possible. When no such response was received, the hearing officer spoke with the agency representative and determined to proceed with the hearing on June 25, 2003.

The grievant did not appear for the June 25, 2003 hearing. The hearing officer states on the hearing tapes that he had attempted to contact the grievant numerous times to no avail and that the grievant was aware of the hearing date. Further, the hearing officer states that the grievant advised that he would be unavailable for the hearing on June 25, 2003 due to his week-long hospitalization. However, the hearing officer goes on to state that the grievant was at home on Tuesday, June 24, the day before the hearing, thus calling into question the credibility of the grievant's reason for being unable to attend the hearing. The hearing officer further acknowledges that the grievant had a medical appointment the morning of the hearing, but fails to find just cause to extend or delay the hearing.

In a June 26, 2003 decision, the hearing officer upheld the grievant's Group III Written Notice and resulting termination.[2]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions…on all matters related to procedural compliance with the grievance procedure."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[4]

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[2] *See* Decision of Hearing Officer, Case Number 5750 issued June 26, 2003, page 4.
[3] Va. Code § 2.2-1001(2), (3), and (5).
[4] *See Grievance Procedure Manual* § 6.4(3), page 18.

Grievant's Absence at Hearing

In the present case, the grievant seeks an administrative review in part to introduce evidence that would have been presented at hearing had the grievant not been absent. Further, there is no question that the grievant informed the hearing officer in advance of the hearing of his inability to be at the hearing on the scheduled date due to an alleged medical appointment or possible hospitalization. Therefore, while the grievant does not specifically allege that the hearing officer's decision to continue with the hearing in the grievant's absence was in error, this Department deems it proper to determine whether doing so was appropriate under the circumstances.

The grievance procedure requires that grievance hearings "must be held and a written decision issued within 30 calendar days of the hearing officer's appointment."[5] The 30 day timeframe can be extended only upon a showing of "just cause."[6] The hearing officer is responsible for scheduling the time, date, and place of hearing and granting continuances for "just cause."[7] Circumstances "beyond a party's control such as an accident, illness, or death in the family" generally constitute "just cause" for a continuance.[8] Further, at the hearing officer's discretion, a hearing may proceed in the absence of one of the parties.[9]

While the EDR Director has the authority to review and render final decisions on issues of hearing officer compliance with the grievance procedure,[10] a hearing officer's decision regarding a hearing continuance will only be disturbed if (1) it appears that the hearing officer has abused his discretion; and (2) the objecting party can show undue prejudice by the refusal to grant the continuance.[11] "Abuse of discretion" in the context of a denial of a motion for continuance has been defined as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay."[12] The test for whether a hearing officer has abused his discretion in denying a continuance is not mechanical; it depends mainly upon the reasons presented to the hearing officer at the time that request is denied.[13]

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[5] *Grievance Procedure Manual*, § 5.1, page 13.
[6] *Grievance Procedure Manual*, §§ 5.1 and 5.4, page 13. "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process." *Grievance Procedure Manual*, § 9, page 24.
[7] *See Grievance Procedure Manual*, § 5.2, page 13 and *Rules for Conducting Grievance Hearings*, § III(B), pages 2-3.
[8] *Rules for Conducting Grievance Hearings*, § III(B), pages 2-3.
[9] *See Rules for Conducting Grievance Hearings*, § IV(A), page 6.
[10] Va. Code § 2.1-1001(5).
[11] Cf. Venable v. Venable, 2 Va. App. 178 (1986). "The decision whether to grant a continuance is a matter within the sound discretion of the trial court. Abuse of discretion and prejudice to the complaining party are essential to reversal." Venable at 181, citing to Autry v. Bryan, 224 Va. 451, 454, 297 S.E.2d 690, 692 (1982). *See also* U.S. v. Bakker, 925 F.2d 728 (4th Cir. 1991) "to prove that the denial of the continuance constitutes reversible error, [the objecting party] must demonstrate that the court abused its 'broad' discretion and that he was prejudiced thereby." Bakker at 735 citing to U.S. v. LaRouche, 896 F.2d 815, at 823-25 (4th Cir. 1990).
[12] Bakker at 735, quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983).
[13] *See* LaRouche, at 823.

Given the grievant's minimal communication with the hearing officer concerning his need for a continuance, despite the repeated attempts by the hearing officer to speak with him, we cannot find that the hearing officer abused his discretion by failing to grant a continuance. Moreover, it does not appear that the grievant was prejudiced by the hearing officer's refusal to postpone the hearing. The grievant claims that had he been able to attend the hearing, he would have submitted information that would have changed the outcome of the hearing. However, at the time he rendered his decision, the hearing officer had before him virtually all the information that the grievant alleges he would have submitted had he been present at the hearing.[14] Further, it appears that the hearing officer considered much, if not all, of this information in his decision. As such, the grievant has failed to show how his inability to present this evidence in person at hearing has prejudiced him. Accordingly, this Department will not disturb the decision of the hearing officer to continue with the scheduled hearing.

Weighing Evidence/Factual Conclusions

The grievant objects to the hearing officer's consideration of evidence and the hearing officer's factual conclusions. Specifically, the grievant claims that the hearing officer erred in (1) failing to adequately consider the grievant's medical condition in determining the appropriateness of the Group III Written Notice; and in (2) concluding that grievant's falling asleep at his job could endanger the lives of others.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[15] and to determine the grievance based "on the material issues and grounds in the record for those findings."[16] By statute, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[17] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant's challenges simply contest the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded testimony and evidence, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

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[14] The only evidence the hearing officer may not have had relates to the grievant's allegation that he has a 100% safety record in his five and a half years with VDOT. However, the hearing decision does not rely on any finding that the grievant had a deficient safety record in the past. Rather, the hearing decision relies on the finding that grievant's recent drowsiness at work presented a current and prospective safety hazard to others.
[15] Va. Code § 2.2-3005(D)(ii).
[16] *Grievance Procedure Manual* § 5.9, page 15.
[17] Va. Code § 2.2-3005(C)(5).

Failure to Consider Mitigating Circumstances

The grievant also claims that the hearing officer erred by not finding mitigating circumstances, which would have resulted in his Group III Written Notice being reduced. In support of this contention, the grievant asserts that his sleeping was not "willful" because his medical condition and/or medications caused him to be drowsy.

Under the grievance procedure, "the hearing officer *may* consider mitigating or aggravating circumstances to determine whether the level of discipline was too severe or disproportionate to the misconduct."[18] Examples of mitigating circumstances include whether the employee was given notice of the rule, consistency of the agency in implementing discipline, and the employee's length of service.[19] The grievance procedure, however, does not *require* hearing officers to review or apply mitigating circumstances. Thus, any failure to mitigate after reviewing the evidence can not be viewed as a procedural violation. Significantly here as well, the hearing officer expressly concluded that under the Standards of Conduct, DHRM Policy 1.60, it was "not necessary for the Agency to show that Grievant intended to fall asleep in order to establish a Group III offense for sleeping."[20]

Additional Considerations

The grievant asserts further that the hearing officer erred in concluding that management was unaware of the grievant's medical condition prior to the February 26, 2003 sleeping incident. On the issue, the hearing decision simply states:

> Grievant contends that the Agency was aware of his medical problem. The evidence, however, showed that the Agency became aware of Grievant's problem only after the Agency initiated disciplinary action against the Grievant.[21]

We note that a hearing officer is not necessarily limited to considering only information that was available to the agency at the time it took action against the grievant. In fact, this Department deems it essential for a hearing officer to consider all relevant and material facts in making his determinations, regardless of when those facts were discovered by management. Here, the decision provides no explanation as to the relevancy or materiality of the above-cited fact finding. Thus, it is unclear from the hearing officer's decision whether he properly confined himself to only those facts available to the agency at the time it issued the discipline. For this reason, the hearing officer is ordered to issue a modified decision clarifying the reasoning behind the above fact-finding, as well as its relevancy and materiality to the issues in this grievance. As always, the hearing officer is granted the sole authority to weigh the evidence and make all determinations on findings of fact.

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[18] *See Rules for Conducting Grievance Hearings*, § VI(B)(1), page 12, (emphasis added).
[19] *Id.*
[20] Decision of Hearing Officer, Case Number 5750 issued June 26, 2003, page 3.
[21] *See* Decision of Hearing Officer, Case Number 5750 issued June 26, 2003, page 4.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[22] The hearing officer's modified decision, once issued, will be a final hearing decision. Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[23] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable. [25]

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Claudia T. Farr
Director

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Jennifer S.C. Alger
EDR Consultant

[22] *Grievance Procedure Manual*, § 7.2(d), page 20.
[23] Va. Code § 2.2-3006(B); *Grievance Procedure Manual*, § 7.3(a), page 20.
[24] *Id. See also* Va. Dept. of State Police vs. Barton, No. 2853-01-4, slip op. at 8 (Va. App. Dec. 17, 2002).
[25] Va. Code § 2.2-1001(5).